

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:1:TL-N-7156-00
FPetrino/VTaverna

date:

to: SBSE, Group 4, Territory 2, Manhattan Compliance
Attention: Carl Perrera
Revenue Agent

from: Area Counsel (CC:LMSB:FSH:MAN:1) (Area 1 - Manhattan)

subject:

[REDACTED]
Taxable Year [REDACTED]
Claim for Refund of Employment Taxes

UIL Nos. 6402.04-03

DISCLOSURE STATEMENT

This advice may contain return information subject to I.R.C. § 6103. This advice may contain confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

We write in response to your request for advice in the above-captioned matter. Specifically you have requested that we provide you with the appropriate language to use in an employee's consent to allow an employer to file a claim for refund of employment taxes ("the employee consents") pursuant to I.R.C. § 6402. We are not providing advice concerning the language to be included in a Form SS-10 for [REDACTED] of Texas and [REDACTED] of Texas, since Murali Balachandran of this office is presently

considering that issue. Further, we understand that you no longer request advice on the wording of the Forms 843, the processing of claims by the Service Center, or the filing of Forms W2-C.

The advice in this memorandum is conditioned on the accuracy of the facts you presented to us. If you determine that these facts are incorrect, you should not rely on this advice. This advice is subject to National Office review. That review might result in modifications to the conclusions contained herein. We will contact you to discuss the National Office's comments, if any, as soon as we hear from that office, which should be in approximately 10 days. In the meantime, you should consider the conclusions contained in this memorandum preliminary.

Issue

What information should be included in a consent from an employee to allow an employer to collect the [REDACTED] refund of employment taxes?

Facts

Our advice considers only the following facts which you have provided to this office. In [REDACTED], the [REDACTED] and [REDACTED] group of companies were involved in several mergers. These groups of companies filed various Forms 940 and 941 for the [REDACTED] taxable year, as well as consolidated Forms 1120. The Examination Division is presently conducting an income tax audit of these groups for the [REDACTED] taxable year. As a result of the examination, the examiners have proposed adjustments which disallow certain deductions for wages. Accordingly, these companies, as employers, now seek a refund of so much of the employment taxes that relate to the deduction for wages which the agents have disallowed.

Since the examiners have not provided this office with information regarding the names of the entities, the details of the mergers, or copies of the Forms 940 and 941 at issue, our advice is limited to a general discussion of what information should be included in the employee consents. As discussed below, in order for the companies to claim a refund of the employment taxes, they must obtain consent from their employees to claim a refund on their behalf.

Discussion

I.R.C. § 3101 provides for a FICA tax on the income of individuals based on a percentage of the individual's wages with respect to employment. I.R.C. § 3102(a) requires the employer of the taxpayer to withhold the FICA tax liability under I.R.C. § 3101

from the employee's wages. Furthermore, I.R.C. § 3111 imposes on the employer an excise tax with respect to individuals he employs.

I.R.C. § 6402 provides authority for making credits or refunds. I.R.C. § 6402(a) states:

GENERAL RULE.-

In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsection (c) and (d), refund any balance to such person.

Treas. Reg. § 301.6402-2 sets forth the procedures for filing a claim for refund of overpayments. Treas. Reg. § 301.6402-2 provides, in part:

(a) *Requirement that claim be filed.* (1) Credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer. Furthermore, under section 7422, a civil action for refund may not be instituted unless a claim has been filed within the properly applicable period of limitation.

(2) ...in the case of a claim filed after April 14, 1968, ... the claim, with appropriate supporting evidence, shall be filed with the service center serving the internal revenue district in which the tax was paid. As to interest in the case of credits or refunds, see section 6611. See section 7502 for provisions treating timely mailing as timely filing and section 7503 for time for filing claim when the last day falls on Saturday, Sunday, or legal holiday.

(b) *Grounds set forth in claim.*--(1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this

paragraph will not be considered for any purpose as a claim for refund or credit.

(2) Neither the district director nor the director of the regional service center has authority to refund on equitable grounds penalties or other amounts legally collected.

(c) *Form for filing claim.* Except for claims filed after June 30, 1976 for the refunding of overpayment of income taxes, all claims by taxpayers for the refunding of taxes, interest, penalties, and additions to tax shall be made on Form 843. For special rules applicable to income tax, see §301.6402-3. For other provisions relating to credits and refunds of taxes other than income tax, see the regulations relating to the particular tax.

(d) *Separate claims for separate taxable periods.* In the case of income, gift, and Federal unemployment taxes, a separate claim shall be made for each type of tax for each taxable year or period.

(e) *Proof of representative capacity.* If a return is filed by an individual and, after his death, a refund claim is filed by his legal representative, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the legal representative to file the claim. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made in the claim showing that the return was filed by the fiduciary and that the latter is still acting. In such cases, if a refund is to be paid, letters testamentary, letters of administration, or other evidence may be required, but should be submitted only upon the receipt of a specific request therefor. If a claim is filed by a fiduciary other than the one by whom the return was filed, the necessary documentary evidence should accompany the claim. A claim may be executed by an agent of the person assessed, but in such case a power of attorney must accompany the claim.

Treas. Reg. § 31.6402(a)-1 states:

(a) In general. - For regulations under section 6402 of special application to credits or refunds of employment taxes, see §§31.6402(a)-2, 31.6402(a)-3, and 31.6414-1. For regulations under section 6402 of general application to credits or refunds, see §§ 301.6402-1 and 301.6402-2 of

this chapter (Regulations on Procedure and Administration). For provisions relating to credits of employment taxes which constitute adjustments without interest, see §§ 31.6413(a)-1 and 31.6413(a)-2.

Treas. Reg. § 31.6402(a)-2(a) sets forth the procedures for the refund of social security tax claimed by the person who paid the tax to the district director; in this case, the employers. Treas. Reg. § 31.6402(a)-2 provides, in part:

(a) Claim by person who paid tax to district director. - (1) In general. Any person who pays to the district director more than the correct amount of-

(i) Employee tax under section 3101, or employer tax under section 3111, of the Federal Insurance Contribution Act, ... may file a claim for refund of the overpayment (except to the extent that the overpayment must be credited pursuant to § 31.3503-1), or may claim credit for such overpayment, in the manner and subject to the conditions stated in this section and § 301.6402-2 of this chapter (Regulations on Procedure and Administration). If credit is claimed pursuant to this section, the amount thereof shall be claimed by entering such amount as a deduction on a return filed by the person making the claim. The return on which the credit is claimed must be on a form which is prescribed for use, at the time of the claim, in reporting tax which corresponds to the tax overpaid. If credit is taken pursuant to this section, a claim on Form 843 is not required, but the return on which the credit is claimed shall have attached as a part thereof a statement which shall constitute the claim for credit, setting forth in detail the grounds and facts relied upon in support of the credit, designating the return period in which the error was ascertained, and setting forth such other information as may be required by the regulations in this subpart and by the instructions relating to the return. No refund or credit of employee tax under the Federal Insurance Contributions Act shall be allowed if for any reason (for example, an overcollection of employee tax having been inadvertently included by the employee in computing a special refund - see § 31.6413(c)-1) the employee has taken the amount of such tax into account in claiming a credit against, or refund of, his income tax, or if so, such claim has been rejected.

(2) Statements supporting employers' claims for employee tax. (i) Every claim filed by an employer for refund or credit of employee tax under section 3101 or

section 3201, or a corresponding provision of prior law, collected from an employee shall include a statement that the employer has repaid the tax to such employee or has secured the written consent of such employee to allowance of the refund or credit. The employer shall retain as part of his records the written receipt of the employee showing the date and amount of the repayment, or the written consent of the employee, whichever is used in support of the claim.

(ii) Every claim filed by an employer for refund or credit of employee tax under section 3101, or a corresponding provision of prior law, collected from an employee in a calendar year prior to the year in which the credit or refund is claimed, also shall include a statement that the employer has obtained from the employee a written statement (a) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (b) that the employee will not claim refund or credit of such amount. The employer shall retain the employee's written statement as part of the employer's records.

Therefore, in the instant case, in addition to filing a claim for refund, the employers must obtain a statement from their employees supporting the employers' claims. Treas. Reg. § 31.6402(a)-2(a)(2). The statements must indicate that the employer has repaid the tax to such employee or has secured the written consent of such employee to allowance of the refund or credit. The employer shall retain as part of his records the written consent of the employee.

Furthermore, the companies in the instant case, as employers, paid the employment taxes to be refunded prior to the year in which they filed the claim. Accordingly, the companies must also obtain a statement from each employee that the employee has not claimed a refund or credit of the amount of the overcollection, or if they did file such a claim, that such claim has been rejected, and that the employee will not claim a refund or credit of such amount. The employers shall retain the employees' written statements as part of the employers' records. Treas. Reg. § 31.6402(a)-2(a)(2).

Since no further action is required by District Counsel, we will close our file in this case within 30 days. If you have any

questions, please call me at (212) 264-1595 ext. 294 or Viviana Taverna at (212) 264-1595 Ext. 211.

ROLAND BARRAL
Area Counsel (Financial Services
& Healthcare:Manhattan)

By: _____
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Attorney